

carry more than three hours of network programming during prime time. 32/

8. Dual Network Rule. Television networks cannot operate more than one television network. 33/
9. Station Rep. Networks cannot represent their affiliates in the sale of advertising in the national spot market. 34/
10. Network Contracts Filed. Local television stations are required to file network contracts with the FCC and place them in the local public file. Television network contracts are available to the public locally and at the Commission. 35/

28. Thus, the network/cable cross-ownership rule must be evaluated as a part of a larger regulatory scheme which has been designed to protect and ensure the independent program judgment of local affiliates and their ability to serve their communities. We believe it to be fundamentally inadvisable to isolate, then dismantle, portions of the existing network regulatory scheme in piece-meal fashion. We are not unmindful of the Commission's pending proposal to rescind the rule barring network representation of affiliates in the spot advertising market, a rule which clearly

32/ 47 C.F.R. §73.658(k) (1987).

33/ 47 C.F.R. §73.658(g) (1987).

34/ 47 C.F.R. §73.658(i) (1987). [The Commission is currently considering repeal of this rule.]

35/ 47 C.F.R. §73.3613(a) (1987).

impacts the issues in this proceeding. As the Commission cautioned in its 12-12-12 decision, "special scrutiny" is required of "sharp departures from the current status of the broadcast industry." ^{36/} The issues raised in this proceeding cannot reasonably be addressed without taking into account the implications of repeal on the Commission's overall network regulatory scheme.

IV.

OWNERSHIP OF CABLE SYSTEMS BY BROADCAST NETWORKS WOULD PREVENT THE EXERCISE OF INDEPENDENT PROGRAM JUDGMENT BY LOCAL AFFILIATES AND IMPAIR THE ABILITY OF AFFILIATES TO SERVE THEIR LOCAL COMMUNITIES

29. Arming the broadcast networks with cable ownership will only add to the already disproportionate degree of leverage they now have over their affiliates ^{37/} and could effectively foreclose the exercise by affiliates of independent judgment concerning carriage or rejection of network programming. As noted earlier, a national network succeeds or fails by the degree to which it is able to marshal a national audience for its advertising messages. When an

^{36/} Multiple Ownership, 56 RR 2d at 885.

^{37/} For an excellent discussion of the leverage networks wield over affiliates, see Further Comments of Station Representatives Association, Docket 78-309, July 25, 1988.

affiliate pre-empts a network program, it frustrates the network's most fundamental goal. Affiliate pre-emptions occur, typically, for one of two reasons: An affiliate might conclude there to be greater local viewer interest in a non-network syndicated program than in a network program (in which case the affiliate might make more money by pre-empting) or the affiliate might determine that local circumstances warrant pre-emption for the broadcast of local news specials, public affairs or other purely local programs specifically directed at local issues (in which case the affiliate will likely receive little if any local advertising revenue and, thus, is likely to make less money).

30. No one would seriously question the importance of protecting the program independence of the nation's 600 network affiliates. First of all, the prospect of pre-emption is a continuing competitive spur to the networks to provide programming responsive to viewer interests; second, the prospect of pre-emption provides a window of opportunity for independent program producers to gain access to an additional 600 television stations; and, third and even more important, pre-emption allows affiliates to provide local programming directed specifically to local needs. In any case, it is clearly in the public interest that the affiliate be sufficiently independent and free from undue influence by its network (or anyone else for that matter) so that it--and it alone--may make program decisions. That, as

noted earlier, is the policy rationale underlying the Commission's 40-year history of network regulation.

31. Cable ownership would give the networks endless opportunity for affiliate manipulation and would compromise every program clearance and compensation negotiation between the networks and their affiliates. Here, in part, is why:

A. Syndication And Financial Interest Rules

32. The Commission's rationale for reinstatement of these rules was to enable local stations to compete fairly with cable systems by allowing stations to negotiate with program owners for exclusivity rights against carriage of syndicated programming on local cable systems. The Commission said its objective was to "create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants." ^{38/} If networks were allowed, as the Commission has proposed, to syndicate programming in the after network market, what kind of position-- given the unique nature of the network-affiliate relationship-- would an affiliate be in to negotiate at "arms length" with its network/syndicator for exclusivity over its network-owned cable system? It couldn't be done. Both the network and the affiliate would know that hard

^{38/} Program Exclusivity in the Cable and Broadcast Industries, 64 RR 2d 1818, 1840 (1988).

negotiation by the affiliate could cost it its network affiliation or, at least, a reduction in compensation for carriage of network programming. ^{39/} Plainly, a network in these circumstances would have an irreconcilable conflict of interest.

33. And how would negotiations for syndicated exclusivity be affected if the syndication rights and local cable systems were owned by another network? Would that network syndicator deny syndicated exclusivity rights (or charge more for them) in an effort to give its network programming or its local network affiliate a competitive advantage?

B. Network Non-Duplication

34. In its recent order amending the non-duplication rules, the Commission also made non-duplication protection of network programming a matter for private "negotiation" between networks and their affiliates. As in the case of future negotiations for syndicated exclusivity, an affiliate would be in no position to negotiate at "arms length" for non-duplication of network programming on its network's cable system.

^{39/} Actually, it would be tantamount to a three-way negotiation with the network on two sides of the table.

C. The Absence Of Must Carry

35. Cable systems provide the final transmission path to the home for cable subscribers. In the absence of must carry a network-owned cable system would not be required to carry the signal of its local affiliate. Would a network argue that network compensation to the affiliate should be reduced to offset the network-owned cable system's cost of providing that final link to the home? The reduction could be subtle and the explanation for it covered by the network under a host of other reasons.

36. A network could use the threat of non-carriage or placement on a higher tier on its cable system of the affiliate's non-network programming to enhance the network's leverage in negotiations with the affiliate over pre-emptions and network compensation. The network could, at virtually no cost, substitute a network owned and operated station for the local affiliate. Plainly, the incentive to do so would be present, a point not likely to go unnoticed by the network or the affiliate in every network-affiliate negotiation.

37. While perhaps not likely in the short-term, network ownership of cable systems in markets with high cable penetration would, as the penetration increased, create an incentive for networks to by-pass affiliates altogether for local distribution of network programming. We realize that might be feasible only in limited circumstances today, but it is plainly another "pressure point" to

which the networks could turn, when necessary, to bring their affiliates in line.

D. Sales Representation

38. If the Commission, as it has recently proposed, were to repeal its rule prohibiting networks from representing their affiliates in the sale of national spot advertising, the network ownership of cable systems in an affiliate's market could easily be used by the network to induce the affiliate to abandon its non-network sales reps and retain the network-owned rep company. Network ownership of the cable company (which would give the network the power to deny carriage of the affiliate) could foreclose any "arms length" negotiations over who will represent the affiliate in the national spot market.

39. In the final analysis, the cumulative effect of cable ownership could deprive affiliates of virtually all independence they have in negotiating with their networks on program clearances and compensation. For that reason alone, the network/cable cross-ownership rule should not be repealed.

V.

THE NETWORK/CABLE CROSS-OWNERSHIP RULE
ENHANCES MARKET FORCES AND FOSTERS
DIVERSITY AND COMPETITION

40. Diversity and competition today, no less than in 1970, are fundamental objectives of the Commission's overall

regulatory policy. ^{40/} As the Supreme Court has noted:

"[T]he Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well by preventing undue concentration of economic power." ^{41/}

The highly competitive nature of today's cable television and television broadcast industries and the wide diversity and variety of national and local program choices are testament to the effectiveness of the network/cable cross-ownership rule in achieving its intended objectives.

41. Cable television systems and local television stations compete head-on in local markets, both in local distribution of television programming and in the sale of local advertising. The Commission itself observed in its recent Report and Order in the syndicated exclusivity proceeding and earlier in the Cable Act implementation proceedings that broadcasting and cable television are competitors in the same market. ^{42/}

^{40/} Those policies are reflected in, for example, the Commission's broadcast multiple ownership rules, 47 C.F.R. §73.3555 (1987), and its policies for comparative broadcast hearings, Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965).

^{41/} FCC v. National Citizens Committee For Broadcasting, 436 U.S. 775, 780 (1978).

^{42/} Program Exclusivity in the Cable and Broadcast Industries, 64 RR 2d 1818, 1835, 1840 (1988).

42. In its recent decision reinstating its cable syndicated exclusivity rules, the Commission emphasized the importance of maintaining a competitive balance between local broadcast stations and cable systems in order to assure program diversity:

"In fulfilling our responsibility under Sections 301, 307(b), and 309, we believe the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants. Promoting fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. . . . Our regulatory scheme should not be structured so as to impair a local broadcaster's ability to compete, thereby hindering its ability to serve its community of license." 43/

Removing the ban on network ownership of cable television would be fundamentally at odds with this explicit and most recent articulation of the public interest considerations affecting the regulation of cable television and local broadcasting.

43/ Program Exclusivity in the Cable and Broadcast Industries, 64 RR 2d at 1840.

43. In the Further Notice, the Commission requested comment on the NTIA's Report and its recommendations that the network/cable cross-ownership ban be eliminated. As the Commission observed, the NTIA recommendation rested, "in particular," on its conclusion that "national programming and advertising markets have become 'more competitive'" since the rule was adopted in 1970. ^{44/}

44. Whatever one's view of NTIA's conclusion with respect to the national programming market, the NTIA Report fails to assess the crucial issue of competition in the local television market and the impact on local markets of eliminating the network/cable cross-ownership ban. The NTIA Report alludes to factors such as the growth of the cable industry and of independent television stations as indicating a clear "trend" towards greater competition in the local distribution market. ^{45/} But it expressly states that it does not address how network ownership of cable systems would impact competition in local markets.

"[W]hat is less certain is whether the increase in alternative distribution outlets is sufficient to ensure that the same market is effectively competitive. It is beyond the scope of this study to undertake an economic analysis of whether the local video distribution

44/ Further Notice, paragraph 6.

45/ NTIA Report, p. 69. NTIA also refers to a slowing in the rate of network advertising revenues from the "double digit" rate of previous years to 2.5 percent in 1987.

market is not effectively competitive.
Further work is warranted to define the
local video distribution market. . . ." 46/

The failure to undertake an economic analysis of the competitiveness of the local video distribution market under current conditions thoroughly undermines NTIA's recommendation to repeal the network/cable cross-ownership ban. Even more telling, however, is that NTIA failed even to consider the potential impact on that market of permitting consolidation of cable and network ownership.

A. Network-Owned Cable Systems Would Be Able To
Discriminate In The Carriage Of Stations

45. In the absence of must carry rules, 47/ cable operators have no obligation to carry local stations, and they may select stations for carriage without restriction. A network-owned cable system would, inevitably, consider the impact carriage of affiliated and non-affiliated stations would have on the competitive program objectives of the network and the local advertising objectives of the network-

46/ Id.

47/ See Century Communications Corp. v. FCC, 835 F. 2d 292 (1987), cert. denied, 56 U.S.L.W. 3818 (1988).

owned cable system. As NBC readily acknowledged in comments filed with the Commission in the must carry proceeding:

"It is plausible to assume that a profit-maximizing cable operator, whether or not in competition with other local cable systems, will choose not to carry on its basic tier broadcast programming that effectively will compete with other programming that the cable system itself transmits. . . ." 48/

46. If, as NBC acknowledges, it is "plausible" to assume that a non-network owned cable system would delete broadcast programming competitive with the cable system's own programming, it is equally "plausible" to assume that NBC's cable system would, as well. Moreover, if, as NBC might put it, it is "plausible" to assume a network-owned cable system would delete "programming" that is competitive with the cable system's "own programming," it is equally plausible to assume a network would delete carriage of a station whose "advertising" was competitive with the network-owned cable system's "own advertising." To assume otherwise is to assume that a network would not act in its own self-interest.

47. CBS put the issue of cable ownership in proper perspective with the statement:

". . . [O]ne fact has not changed: in virtually all cable communities, there

48/ NBC Comments, Docket 85-349, Jan. 29, 1986, p. 22, fn. *.

is only one cable system, and that cable system effectively controls viewers' access to local broadcast signals." 49/

48. A network-owned cable system might refuse to carry a station affiliated with a competing network in order to bolster the competitive position of its local affiliate. A network-owned cable system might also be reluctant to carry a local independent station for the same reason. Decisions by network-owned cable systems concerning carriage of distant stations would involve considerations concerning the impact carriage of distant non-network programming might have on the audience enjoyed by the network's programming. And, of course, the choice of cable networks carried would also be influenced by their impact on the audience for the network's programs.

49. These same considerations must also be taken into account in terms of the competitive effect that carriage of advertising from a local station would have on the sale of advertising by the network-owned cable system. A network-owned cable system, for example, might carry its affiliate's network programming, but delete the affiliate's non-network programming and substitute the cable system's own programming and advertising messages.

49/ Comments of CBS, Inc., Docket 85-349, Jan. 29, 1986, p. 4.

50. The Commission in adopting its new multiple ownership rules noted that it would not "absent compelling circumstances" allow a network to acquire an independent station in a market while maintaining a local affiliation with another station. ^{50/} Effective ownership of all television channels in a local market through ownership of the local cable system would clearly pose greater anti-competitive considerations.

51. In sum, in the absence of must carry rules, network-owned cable systems would have unfettered discretion to discriminate against local and distant stations which carry programming and advertising which compete with them. Such discrimination would not only inhibit competition among local distributors of television programming and competition in the sale of local television advertising, it would also adversely affect the diversity of programming and advertising services available to subscribers of network-owned cable systems.

B. Network Ownership Of Cable Systems Would Adversely Affect Competition In The Program Production Industry

52. Network ownership of cable systems would not only adversely affect the diversity of programming available to

^{50/} Multiple Ownership Rules, 56 RR 2d at 882, n. 117.

cable subscribers; it would also reduce competition in the program production industry by reducing the number of potential purchasers of television programming. At present, the networks enjoy a dominant position as purchasers (and, to a limited extent, producers) of television programming for network exhibition. However, program producers which are not successful in selling their product for network exhibition now may look to cable systems as alternative purchasers.

53. This market would be changed if networks were permitted to own cable systems. Program producers would not only have to deal with the networks in order to obtain network exposure for their product but would also have to deal with the networks to obtain cable carriage for their programs. Networks could refuse to afford cable exposure to programs deemed too competitive with network programming. The networks would thus control not one but two video gateways to the home, an anticompetitive bottleneck which those seeking access to viewers should not be required to overcome. As the Commission observed in its decision adopting the new multiple ownership rules: "The major potential harm from vertical integration is foreclosure of access of independent producers to audiences," ^{51/} concluding that vertical integration "has the potential for

^{51/} Multiple Ownership, 56 RR 2d at 882.

anticompetitive consequences only when most or all outlets in a significant area are commonly controlled." ^{52/} If a network owned a local cable system, it would, as CBS has acknowledged, control absolutely "viewers' access" in cable homes.

54. The Commission recognized 30 years ago that networks might embark on other enterprises that would give them an unfair competitive advantage in the network business.

" . . . [W]e are convinced that the conduct, by a network, of two operations so inherently competitive with each other unavoidably creates incentive to moderate or regulate the conduct of the less significant operation in such a manner as to maximize the network's revenues and profits." ^{53/}

55. In short, because of the inherent potential for anticompetitive abuse, cable ownership is a business from which the broadcast networks should continue to be foreclosed.

^{52/} Id.

^{53/} Network Representation Of Stations In National Spot Sales, 27 FCC 697, 715 (1959).

VI.

THE FURTHER NOTICE FAILS TO COMPLY WITH THE REQUIREMENTS OF THE REGULATORY FLEXIBILITY ACT

56. The Regulatory Flexibility Act requires the Commission to evaluate the potential impact elimination of the network/cable cross-ownership rule would have on small business entities. While the regulatory flexibility analysis in the Further Notice addresses the anticipated impact elimination of the rule would have on "small cable systems," it does not address the impact that elimination of the rule would have on "small television stations."

57. The Commission's Regulatory Flexibility analysis states:

II. Objective:

The objective of this action is to eliminate unnecessary regulation, thus permitting the marketplace to operate more freely and efficiently. In particular, networks may benefit by their ability to own cable systems, and cable systems may benefit through being owned by networks.

* * *

IV. Description, Potential Impact and Number of Small Entities Affected:

The proposed action is not expected to have a significant impact on most small cable systems. However, to the extent that networks purchase existing small cable systems, the systems may benefit from the expertise of the network, or from the possible infusion of additional capital into the cable system. To the extent that networks choose to purchase large cable systems or that large cable systems choose

to purchase networks, there should be little or no direct impact on small business entities.

58. Conspicuously absent from this "analysis" is any recognition of the fact that many, if not most, local television stations are small business entities, ^{54/} and, as noted earlier, they would be adversely affected economically by repeal of the rule. To that extent, the Further Notice fails to comply with the requirements of the Regulatory Flexibility Act.

VII.

CONCLUSION

59. In summary, the duty of the Commission to protect the independence of local broadcast stations and to structure an environment for fair and vigorous competition goes to the heart of its statutory and public interest responsibilities. Because the network/cable cross-ownership rule enhances market forces in achieving program diversity and competition, we respectfully urge that the rule be retained.

^{54/} 15 U.S.C. §632 (1988); 13 C.F.R. §121.2 (1988).

This 24th day of October, 1988.

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